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## Mistake of Law—Recovery of Money Paid Under Such Mistake

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defendant was protected by indemnity insurance. In the instant case there was no other way to attack the witness's credibility except by asking the question in the presence of the jury. On this basis the two cases are distinguishable.

It is interesting to note that there is another exception to the general rule. Where the defendant denies control of the injuring instrumentality, evidence that he carried indemnity insurance to protect himself if anyone were injured by the instrumentality may come in to show his control over that instrumentality. *Barg v. Bousfield*, 65 Minn. 355, 68 N.W. 45 (1896); *Perkins v. Rice*, 187 Mass. 28, 72 N.E. 323 (1904). It is hardly likely that the defendant would carry indemnity insurance on an instrumentality over which he has no control.

The West Virginia court implies in its opinion that if such witness was *P*'s witness in chief, it would constitute reversible error for the indemnity insurance fact to be disclosed, which is to say that *D* should not have brought this particular witness into the case at all, and having done so, must bear the consequences of it.

C. W. G.

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MISTAKE OF LAW—RECOVERY OF MONEY PAID UNDER SUCH MISTAKE.—*P* borrowed \$4,000 from *H*, giving a negotiable promissory note secured by a trust deed conveying certain realty. *H* employed *D*, an attorney, for collection purposes and *P* paid *D* installments amounting to \$500, receiving receipts from him. *D* applied this sum to debts owing him from *H*. Subsequently *P* sold the real property and sought a necessary immediate release of the lien. *H* refused to release until the amount withheld by *D* was credited on the debt. *P* then paid an additional \$500 to *H* and received the release, and later instituted a notice of motion for judgment proceeding against *H* and *D* to recover the \$500.

*D* entered a special plea, to which *P* demurred. The demurrer was sustained. The matter being submitted on the pleadings, the trial court entered judgment against *H* and *D*. The supreme court granted a writ of error to *D*, *H* having made no defense below. The court found no contractual basis for the proceeding against *D* and reversed, overruling *P*'s demurrer. *Case v. Shepherd*, 84 S.E.2d 140 (W. Va. 1954).

*D*'s special plea contended that *P* showed no contract, express or implied, between *D* and *P* and that the payment to *H* constituted a voluntary payment made with full knowledge of all material facts at the time and no recovery should be permitted.

The court found from the facts in the record that there was no express contract between *P* and *D* that *D* was to refund the \$500 to *P* under any circumstances; and further that there was no "meeting of the minds" necessary for the creation of an implied contract between *P* and *H* whereby *D* agreed to refund to *P*. There was, therefore, no right to recovery against *D* under W. VA. CODE c. 56, art. 2, § 6 (Michie, 1949), providing for notice of motion for judgment proceedings based upon contractual obligations and the court so held; reversing the trial court and overruling *P*'s demurrer to *D*'s special plea.

In stating another basis for precluding recovery the court held *P* chargeable with knowledge of the rule of law that payment to an agent is payment to the principal; and that therefore the second payment to *H* was made under a mistake of law and could not be recovered from *D*. While this is a dictum because it was not necessary to the disposition of the case, it is interesting to note that the court inserted the point into the syllabus. Query: Whether this is the law of the case? See Hardman, "*The Law*"—*In West Virginia*, 47 W. VA. L.Q. 23 (1940); Hardman, "*The Syllabus is the Law*", 47 W. VA. L.Q. 141 (1941), and Hardman, "*The Syllabus is the Law*"—*Another Word*, 47 W. VA. L.Q. 209 (1941) for a discussion of this point.

The principle that money paid under a mistake of law cannot be recovered is firmly established in the decisions of the West Virginia court and the majority of other American courts. *Alderson v. Gauley Fuel Co.*, 116 W. Va. 95, 178 S.E. 626 (1935); *Coburn v. Neal*, 94 Me. 541, 48 Atl. 178 (1901); *Morgan Park v. Knopf*, 199 Ill. 444, 65 N.E. 322 (1902); RESTATEMENT, RESTITUTION, SEAVEY & SCOTT'S NOTES §§ 44, 45 (1937). Had the point been necessary to decide in the principal case, the court would have had a choice of following earlier decisions or of reversing an entire line of precedents, which are cited in the opinion. The dictum factor makes the question academic, yet it is submitted that the rule above stated is not a sound one.

Historically, the doctrine that money paid under a mistake of law cannot be recovered dates back some 153 years. It first appeared in *Bilbie v. Lumley*, 2 East 469 (1802). There Lord Ellenborough apparently rested his refusal to allow restitution upon the ground that "everyone must be taken to be cognizant of the law." This was an unwarranted distortion of the rule that "ignorance of the law is no excuse" for the commission of a crime or of a tort. The later English case of *Brisbane v. Dacres*, 5

Taunt. 143 (C.P. 1813), followed the rule thus laid down and the spadework was done; courts followed the two precedents without analysis. It is interesting to note that Lord Ellenborough himself seemed to take a different view of his opinion than did others who read it, since in 1811 in the case of *Perrott v. Perrott*, 14 East 423, 104 Eng. Rep. 665 (K.B. 1811), he allowed relief against a mistake of law. This, of course, tends to show that no absolute general principle was intended to apply in civil cases. In criminal or tort cases the reason for the rule is apparent, since one should never be allowed to excuse an act resulting in the commission of a crime or in damage to another party by asserting a mere mistake as to knowledge of the rule of law applicable.

However, in civil cases, no apparent basis for the rule exists with the exception of the lame precedent set down by Lord Ellenborough. For an interesting but brief discussion of the topic, see *RESTATEMENT, RESTITUTION* 179 *et seq.* (1937).

The rule is generally justified by blanket assertions that any other course would cause insecurity in contractual relations plus numerous other generally undesirable results. See, for example, *RESTATEMENT, RESTITUTION* § 45. At least two states have refused to follow the Ellenborough rule from its beginning, and without apparent disastrous after effects. *McMurty v. Kentucky Central Ry.*, 84 Ky. 462, 1 S.W. 815 (1886). *Northrop v. Graves*, 19 Conn. 548, 50 Am. Dec. 264 (1849).

Other states have attempted to abolish the distinction between a mistake of law and one of fact by statute. See Note, 13 *NOTRE DAME LAW*. 215 (1938).

It has been suggested that if an injustice has been done in a transaction and one party has received money which in equity and good conscience he should not retain, the demand of finality of transaction, however desirable, should not be controlling but should give way to justice. Note, 9 *VA. L. REV.* 220 (1923).

It is notable that the West Virginia court in the principal case speaks of implied contracts only. An implied contract is a true contract arising out of an implication of fact in which the meeting of intentions of the parties is a fact legitimately inferred from conduct, the intention being ascertained and enforced and the contract defining the duty. *Estate of John C. Gilbert*, 115 W. Va. 599, 177 S.E. 529 (1934); *First Nat'l Bank v. Matlock*, 99 Okla. 150, 226 Pac. 328 (1924).

It is quite probable that counsel made no mention of quasi contracts in the principal case, although certainly this classification

suits the situation at hand rather than implied contracts. Quasi contracts are in reality not contracts at all since they do not rest upon a meeting of intentions, expressed by words or by conduct, but are obligations created by a legal fiction in order to do justice. *Bicknell v. Garrett*, 1 Wash.2d 564, 96 P.2d 592 (1939). This legal fiction was invented by the common law courts in order to permit a recovery in an action of assumpsit in cases where there is in fact no contract, but the circumstances are such that under the law of natural justice there should be a recovery as though there had been a promise. *Clark v. People's Sav. & L. Ass'n*, 221 Ind. 168, 46 N.E.2d 681 (1943). The West Virginia court draws this distinction between implied contracts and quasi contracts in *Johnson v. Nat'l Bank*, 124 W. Va. 157, 19 S.E.2d 441 (1942).

There seems to be no theory under which *P* could recover the \$500 from *D*. At the time collections were made by *D* there was a valid outstanding obligation to *H* owing by *P*, and payment to the agent is without doubt payment to the principal. The only questionable payment made was that of *P* to *H* to secure the release of the trust deed upon *P*'s property, and this transaction in no way involved *D*. The court states that it was not here concerned with *P*'s right to recover from *H*. Admittedly the result of the court's decision is correct, and merely a secondary basis for so holding is questionable, though firmly substantiated under the doctrine of *stare decisis*. It is submitted that the court should overrule the precedents and abolish the unreasonable distinction between mistakes of law and of fact.

H. C. B., Jr.

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PLEADING AND PRACTICE—REPRESENTATIVE CAPACITY.—*P* filed a declaration suing *Ds*, "as trustees of" a certain union. *Ds*, by a special plea, alleged that the process was served against them as individuals, so that to suffice, the action had to be against all the members of the union. The court cited *Milan v. Settle*, 127 W. Va. 270, 20 S.E.2d 269 (1944), indicating that the failure to use "as" showed a desire to sue *Ds* in individual capacity. Since "as" was present in this declaration and since the court found the action to be against *Ds* in their representative capacity, it would seem that the use of "as" denotes, to the court's satisfaction, the intent to sue one in his representative capacity. However, the court went on to hold that the capacity of a plaintiff or defendant in a suit is "to be determined from all the allegations of the pleading." *Marion v. Chandler*, 81 S.E.2d 89 (W. Va. 1954).